UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/052
Judgment No.: UNDT/2013/070
Date: 23 April 2013
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Officer-in-Charge

STOYKOV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Miles Hastie, OSLA

Counsel for Respondent:
Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant is a former staff member of the United Nations Economic Commission for Africa (ECA), who occupied the post of Chief of the Facilities Management Section in the Division of Administration. He filed a claim with the Tribunal contesting the decision of the Respondent to summarily dismiss him on the ground of misconduct and is praying that he be reinstated in his post.

Background facts

2. The Applicant entered the service of the United Nations in February 1995 as Officer-in-Charge (OIC) of ECA's Building Management Unit at the P4 1evel. In June 2004 he was promoted to Chief of the Facilities Management Section at the P5 level.

3. In August 2001 the Applicant's wife established a company called BG Trading. The company remained in her name until her death in July 2004 when the Applicant, along with his two children, inherited a 95% share in the company.

4. The Applicant's brother, Mitko Stoykov, was the owner of a company called Rila Constructions. The Applicant sent a number of emails on behalf of both BG Trading and Rila Constructions from his United Nations email account (Lotus Notes) mainly during 2002.

5. In December 2004 the Applicant conducted a bidding exercise for his private residence. He obtained four offers and decided to employ a company called Geom Luigi Varnero Impreza Costruzioni PLC (Varnero) to carry out some work on his property. Varnero was also a company which carried out contractual work for the United Nations and due to his role as Chief of the Facilities Management Section the Applicant had dealt with this company. The Applicant received a volume discount of 6.5% from Varnero for the work carried out on his residence.

6. The Applicant also employed a company called Elmi Olindo & Co, PLC (Elmi) to do some work on his property. This company was also carrying out work on United Nations contracts. He did not receive any discount.

7. Construction of the Applicant's property took place between January 2005 and December 2005. The Applicant informed all of his work colleagues, including his director of the construction of his property and the companies employed by him to carry out the work. His colleagues visited the construction site to see the progress being made.

8. Between 24 February 2007 and 6 March 2007, the Applicant exchanged several emails with the financial disclosure office at the United Nations in which he disclosed the existence of BG Trading and the nature of its business. On 24 October 2007, the Applicant informed the Ethics Office in writing of a potential conflict with companies that he had retained for the construction of his building in 2005.

9. In March 2008 the Applicant's computer hard disk was taken by the Procurement Task Force (PTF) in commencement of the investigation against him. During the investigation process the Applicant was interviewed on 8 and 9 October 2008. The Applicant responded to a voluntary information disclosure request on 23 October 2008. He was provided with a notice of findings letter on 3 November 2008 to which he responded on 17 November 2008 providing additional information to the PTF on 2 and 3 December 2008.

10. The Applicant was informed by memorandum dated 26 March 2009 that he was charged with 10 counts of misconduct. He responded to those charges on 15 May 2009.

11. The Applicant was informed by letter dated 5 February 2010 that he was summarily dismissed following findings of misconduct against him as his conduct constituted a violation of staff regulations 1.2 (g) (m), (o) and (q). He was also informed that his conduct: (i) demonstrated a failure to discharge his functions with the highest standards of fairness, integrity and transparency, in violation of Financial Rule 5.12 and staff regulations l.2 (a), (e) and (f); and (ii) constituted a

violation of the United Nations Procurement Manual, specifically sections 1.1(9), 4.1.5(3) and 4.2.1(4).

Issues

12. Based on the parties' written and oral submissions, the Tribunal deems the following to be the legal issues that need to be determined in respect of the decision to summarily dismiss the Applicant.

a. Whether the Applicant's due process rights were respected;

   i. The conduct of the PTF investigation;

   ii. The effect of the absence of counsel or other representative;

   iii. The propriety in the use of the Applicant's record of interview as a basis for the disciplinary charges; and

b. The effect of the breach of due process rights, if any, at the stage of the investigation;

c. Whether the acts complained of amount to misconduct; and

d. Whether the sanction of summary dismissal was proportionate to the acts of misconduct.

The Procurement process

13. Before dealing with the issues, the Tribunal will very briefly set out the rules regarding procurement and the conduct expected of individuals engaged in that process. The rules applicable in the present case are embodied in the Procurement Manual 2004[1] and the Financial Regulations and Rules, 2003[2]. The relevant Rules for the present purposes are the following: sections 1.1(9), 4.1.5(3) and 4.2.1(4) of the 2004 Procurement Manual; Financial Rule 5.12 as well as former staff regulations 1.2 (a) (e), (f), (g) (m), (o) and (q).

[1] The Procurement Manual was revised in 2008 and 2010
[2] ST/SGB/2003/7

14. Section 1.1(9) of the 2004 Procurement Manual reads: "All staff members of the UN are required to comply with the provisions of this Manual. This includes Procurement Officers as well as staff members of the Requisitioning Offices, at HQ[3] departments, OAH[4] and Missions".

15. Section 4.1.5(3) reads:

> The UN procurement process, which includes the generation of specifications and scope of work, certification of funds, identification of potential Vendors, evaluation of Submissions received, receipt & inspection and payment, is intended to allow Vendors to compete for UN business on a fair basis. Staff associated with the procurement function, therefore, are responsible for protecting the integrity of the procurement process and maintaining fairness in the UN's treatment of all Vendors.

16. Section 4.2.1(4) reads:

> (1) It is of overriding importance that the staff member acting in an official procurement capacity should not be placed in a position where their actions may constitute or could be reasonably perceived as reflecting favourable treatment to an individual or entity by accepting offers of gifts and hospitality or other similar considerations. The staff member should have regard not simply as to whether they feel themselves to have been influenced, but to the impression that their action will create on others".
>
> (4) Advance disclosure is a primary guiding principle for any real or perceived conflict of interest".

17. Rule 5.12 of the Financial Rules reads:

> Procurement functions include all actions necessary for the acquisition, by purchase or lease, of property, including products and real property, and of services, including works. The following general principles shall be given due consideration when exercising the procurement functions of the United Nations:
>
> (a) Best value for money;
>
> (b) Fairness, integrity and transparency;
>
> (c) Effective international competition;
>
> (d) The interest of the United Nations.

[3] UN Headquarters
[4] Office away from Headquarters

18. Former staff regulation 1.2 (e) reads:

> By accepting appointment, staff members pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all staff members by virtue of their status as international civil servants.

19. Former staff regulation 1.2 (f) reads:

> While staff members' personal views and convictions, including their political and religious convictions, remain inviolable, staff members shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and, in particular, any kind of public pronouncement that may adversely reflect on their status, or on the integrity, independence and impartiality that are required by that status.

20. Former staff regulation 1.2 (g) reads: "Staff members shall not use their office or knowledge gained from their official functions for private gain, financial or otherwise, or for the private gain of any third party, including family, friends and those they favour. Nor shall staff members use their office for personal reasons to prejudice the positions of those they do not favour".

21. Former staff regulation 1.2 (m) reads: "Staff members shall not be actively associated with the management of, or hold a financial interest in, any profit-making, business or other concern, if it were possible for the staff member or the profit-making, business or other concern to benefit from such association or financial interest by reason of his or her position with the United Nations".

22. Former staff regulation 1.2 (o) reads: "Staff members shall not engage in any outside occupation or employment, whether remunerated or not, without the approval of the Secretary-General".

23. Former staff regulation 1.2 (q): "Staff members shall use the property and assets of the Organization only for official purposes and shall exercise reasonable care when utilizing such property and assets".

24. In the procurement process, there are two main actors at the initial stage of a bidding process - the requisitioner and the procurement officer who, in the fulfilment of their duties and obligations, have to comply strictly with the Procurement Manual as provided by section 1.1(9) of the Manual. They also have to abide by all the relevant staff rules referred to above.

25. The Procurement Manual defines "requisitioner" as a:

> UN official, who is responsible for submitting to UN/Procurement Services (UN/PS) or Chief Procurement Officer (CPO), through the Certifying Officer, for their action, an approved IMIS pre-encumbrance document, or similar document from the local requisitioning system. The requisitioner shall develop an acquisition plan in cooperation with the UN/PS or CPO and upon identifying a future need and conduct market research, shall develop the scope of the requirement through generic technical specifications.

Were the Applicant's due process rights respected?

26. The Applicant submitted that his due process rights had been violated for the reasons that: the PTF never informed him of the allegations; never instructed him that he had a right to counsel and never told him how the statements he would make to the PTF would be used against him. The Applicant also submitted that he was not provided with copies of all evidence gathered during the investigation. In particular, he was not given copies of several witness interviews, which were potentially exculpatory. The exculpatory evidence was not considered by the PTF. The Applicant also alleged that the PTF was biased and used inflammatory language in its findings regarding him.

27. The Respondent submitted that at every stage of the investigation: the Applicant was informed of the issues, provided all relevant documentation, was invited to comment and given ample opportunity to defend himself. He was informed of the scope of the allegations and was furnished with copies of the records of the interviews. Relying on the testimony of Mr. Jose Luis Martinez, PTF Investigator, the Respondent submitted that at no time did the investigators tell the Applicant that he was not entitled to have the assistance of counsel and that at any rate he never asked for counsel.

The conduct of the PTF Investigation

28. The UNAT stated in *Molari* 2011-UNAT-164 that disciplinary cases are not criminal because liberty is not at stake. However when dealing with the right to work, which is also a fundamental right, a court of law should ensure that before an individual loses his/her right to work on the ground of misconduct or impropriety, proper procedures, that do not oppress the due process rights of that individual, have been followed.

29. All the rights that an accused enjoys in the course of a criminal trial may not necessarily be available to a person who is subjected to disciplinary proceedings. Thus, the exercise that the Tribunal should undertake in such a situation is an analysis of whether the basic interests of a staff member were safeguarded in the light of the nature of the charges, the nature and complexity of the investigation, the need to afford protection to witnesses, whether the absence of confrontation is detrimental to the interest of the staff member, whether the absence of witnesses so weakens the evidence in support of the charges that it cannot be relied upon and whether overall the proceedings were fair[5].

30. Once there is an allegation of a breach of the rules or regulations of the Organisation that may give rise to a case of misconduct or impropriety, a fact finding exercise is supposed to be conducted under ST/AI/371 (Revised disciplinary measures and procedures). A staff member, including one who is the subject matter of the inquiry, is under an obligation to cooperate with the investigators in compliance with staff regulation 1.2 (r).

31. In the present case, the preliminary investigation was undertaken by the PTF, which was established as a temporary investigative unit within the Office of Internal Oversight Services (OIOS). The OIOS itself was established by ST/SGB/273 (Establishment of the Office of Internal Oversight Services) of 7 September 1994, which implemented General Assembly resolution 48/218B of 29

[5] *Liyanarachchige* UNDT/2010/041.

July 1994. The PTF was tasked with investigating cases of procurement fraud, corruption, and violations of the Organisation's rules, regulations and procedures[6].

32. Paragraph 18 of ST/SGB/273 recognizes the need for the Organization to put in place mechanisms to protect individual rights, the anonymity of staff and others, due process for all parties concerned and fairness during any investigation.

33. A "Manual of Investigation Practices and Policies" (the Manual) was drafted for the guidance of investigators. The Manual that is relevant to the present case was prepared on 4 April 2005 under the hands of the then Under-Secretary-General of OIOS, Mr. Dileep Nair.

34. The authors of the Manual were fully alive to the stark reality that the concepts of due process and fairness are not elaborated on either in the General Assembly resolution or ST/SGB/273. This omission is clearly pointed out at paragraph 47 of the Manual. Given that fact, the authors have set out what, they no doubt, genuinely believe due process and fairness should encompass for the purposes of an investigation. This is set out at paragraph 48 of the Manual:

> In ascertaining the meaning of the concepts of 'due process' and 'fairness' during an ID/OIOS investigation it is important to recall that the General Assembly has mandated that staff must cooperate with ID/OIOS investigations. It follows that the General Assembly intended that 'due process' and 'fairness' principles that are to be applied must be consistent with both the fact finding nature of the mandate and the obligation of staff to cooperate.

35. Paragraph 12 of the Manual highlights the fact finding nature of an OIOS investigation by enunciating that the role of ID/OIOS is to establish facts and make recommendations in the light of its findings. In the pursuit of its mandate to investigate, OIOS has a wide range of powers. Staff members are under an obligation to extend to OIOS investigators their full cooperation.[7] The investigators have unfettered access to all work areas of the Secretariat including all office and work records whether in paper or electronic form.[8]

[6] See Report of Procurement Task Force page 1 Para 1
[7] The OIOS Manual, paragraph 15.
[8] Ibid, paragraph 16.

36. Further, paragraph 39 of the Manual stipulates that confidentiality is a basic principle of investigative methodology and fairness. Exceptions to the rule of confidentiality do exist where there is a need for a translator, or the release of information to prevent fraud or to protect staff or to counteract misleading press accounts. Information may also be released on-going investigations into criminal activity to obtain cooperation from appropriate authorities of a Member State.[9]

37. The investigative standards applicable to witnesses are: (i) a witness will be informed of the general nature of the matter under investigation but not the identity of the person being investigated;[10] (ii) the questions put to a witness should be clear and the witness must have a full opportunity to respond in his/her own words; (iii) witness interviews must be documented with full regard to confidentiality;[11] (v) confidentiality means that only the witness and the investigators are present at the interview.[12] Exceptionally translators may be present at the discretion of the investigators;[13] and (vi) a witness may be informed that information supplied by him/her may be used to confront the individual under investigation.[14]

38. Paragraph 49 encompasses a broad rule that presumably applies to all staff including a staff member under suspicion. The rights listed at that paragraph are: (i) an obligation of the staff member to answer questions; (ii) no right to counsel during the fact finding exercise; and (iii) refusal to supply information may result in a case of misconduct. Paragraph 50 deals more specifically with the rights and obligations of a staff member under investigation. These rights or obligations are: (i) that a staff member is to be given a reasonable opportunity to present his/her version of the facts and to present evidence or witnesses (ii) the staff member must be made aware of the allegations; and (iii) the staff member may be questioned further to explain inconsistencies between his/her version and that of witnesses.

[9] Ibid, paragraphs 38-46.
[10] Ibid, paragraph 59.
[11] Ibid, paragraph 57.
[12] Ibid, paragraph 60.
[13] Ibid.
[14] Ibid, paragraph 61.

39. Prior to the finalisation of the report of the investigators the staff member must be made aware of the scope of the possible misconduct and be given an opportunity to explain why his/her action was proper and to present further evidence or witnesses.[15] A staff member is normally questioned by two investigators and a staff member who is prepared to admit to a violation of the United Nations regulations, rules or administrative issuances may be asked to prepare and sign a statement.[16]

Is the Tribunal bound by the Guidelines of OIOS?

40. In *Villamoran* UNDT/2011/126, Ebrahim-Carstens J. observed:

> At the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions (see Hastings UNDT/2009/030, affirmed in Hastings 2011-UNAT-109; Amar UNDT/2011/040). Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances.

41. Nowhere are the precepts of the Manual included in any resolution, rule regulation or administrative issuance. They are only guidelines for investigators and the Tribunal cannot elevate them in the hierarchy and accept them as standard norms of fairness and due process when judged by the international standards on the rule of law and human rights. To the extent that the precepts in the Manual contravene a known principle of human rights the Tribunal is not bound by them.

42. The Tribunal is conscious of the duty and obligation of the Organization to investigate and sanction, in appropriate cases, those staff members who are guilty of misconduct. This duty and obligation is not, however, a complete licence to the investigators of the Organization to set out their own rules in the exercise of the

[15] Ibid, paragraphs 52 & 53.
[16] Ibid, paragraph 54.

wide powers of questioning, search and seizure that they have. In the pursuit of its mandate in the investigative process, the Organization needs to reconcile its duty and obligation with the rights of staff members under investigation.

43. However inconvenient or cumbersome this exercise may be, the Tribunal cannot subscribe to the proposition that, when a staff member may run the risk of losing his/her job, human rights should be subservient to administrative convenience in seeing the culprits being sanctioned. The right to work is guaranteed by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and as such, the Tribunal cannot remain content to accept the due process and fairness rules that OIOS has formulated in the Manual for the use of investigators as the norm that should be applied in the course of an investigation when clear allegations of misconduct or impropriety have been formulated against the staff member. At that stage the process has left the realm of a preliminary investigation. While the investigators may be bound to comply with the rules in the OIOS Manual, the Tribunal is of the firm view that they do not constitute the norms that are binding on a court of law.

44. In *Johnson* UNDT/2011/123, Kaman J. noted that there are two distinct investigatory procedures set out in ST/AI/371 (Revised disciplinary measures and procedures) in that section 2 deals with preliminary investigations while section 6 deals with formal investigations. The Tribunal opined that:

> For an investigation to be regarded as merely preliminary in nature, some 'reason to believe' must exist that a staff member has engaged in unsatisfactory conduct, but the investigation must not have reached the stage where the reports of misconduct are "well founded" and where a decision already has been made that the matter is of such gravity that it should be pursued further, through a decision of the [Assistant Secretary-General, Office of Human Resources Management]. Where the latter threshold has been reached, the investigation at that point ceases to be preliminary and in substance converts to a formal investigation with a focus on a specific staff member […].
>
> It is a fundamental principle of due process that where an individual has become the target of an investigation, then that person should be accorded certain basic due process rights […].

45. Firstly, a staff member who is under investigation or who has been charged enjoys the presumption of innocence. Secondly, under the present system of investigating and charging, a staff member is denied the right to confront witnesses. Once the investigation is completed and the staff member is charged there is no hearing and therefore no chance to be heard.[17] All that the staff member is entitled to is to provide comments to the charges.

46. In *Liyanarachige* 2010-UNAT-087 the United Nations Appeals Tribunal (UNAT) held that: "[a] disciplinary measure may not be founded solely on anonymous statements. In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defense and the requirements of an adversary procedure". Once the investigation report is sent to the ASG/OHRM a decision is taken by the administration on materials that appear on paper only. This is a case of a "paper hearing" that decides on the fate of a staff member charged with misconduct. Without imputing any motives to those who have to decide on the fate of that staff member in the recesses of the administration, the Tribunal is of the view that given that peculiar procedure, it is imperative that the rights of a staff member are fully guaranteed at the investigative stage. The answer that the staff member is given all latitude to respond on paper is no argument to deny him/her his/her due process rights.

Absence of counsel or other representative

47. In *Mushema* UNDT/2011/162, the Tribunal held that due process entails the staff member being informed of his/her right to counsel if there is any incriminating matter that has been raised against or by him or her. But in *Applicant* 2012-UNAT-209, UNAT held that there is no obligation or requirement of the presence of counsel at the investigation stage. UNAT added that the presence would hinder the investigation. With due deference to UNAT this Tribunal cannot agree with that proposition. The UNAT has not explained how counsel would hinder an investigation. This Tribunal has not seen any evidence in the UNAT judgment about this wide proposition and no court of law should either

[17] *audi alteram partem.*

assume that the presence of counsel would hinder an investigation without clear evidence or take judicial notice of such a fact. A judicial proposition of that nature may well cast aspersions on the role of counsel who attends a police investigation or an investigation relating to misconduct to assist his/her client and not to hinder an investigation. At any rate the investigators have a wide discretion to call counsel to order or even to suspend an investigation in case of any or attempted hindrance by counsel.

48. If a staff member under investigation is denied access to a lawyer or to confront witnesses and he/she is not made aware of the consequences of answering questions to which the answers might be incriminating then surely this cannot be equated to fairness or due process.

49. When the Applicant appeared before the PTF he was specifically told the following:

> The Task Force is examining certain procurement matters. You are one of the subjects of the OIOS' investigation at ECA. We will discuss the specific allegations as we proceed with the interview. Generally, the allegations concern your relationship with a number of vendors. This matter was referred to the Task Force after procurement bidding irregularities were reported to the ECA.

50. The Applicant was asked numerous questions on his relationship with a number of construction and other companies operating in Ethiopia and who were also United Nations vendors. More particularly he was asked detailed questions on the construction of his house and the advantages he might have obtained from the company engaged on that construction, which was also a United Nations vendor. He was asked whether he helped other people including his wife in running their businesses by using his United Nations computer.

51. Under the former Staff Rules no disciplinary measure could be taken unless the matter had been referred to the then Joint Disciplinary Committee (JDC) for advice on appropriate measures. Non-referral to the JDC could occur when there was a waiver by mutual agreement of the staff member and the Secretary General or where the misconduct was of such a serious nature that immediate dismissal was warranted.

52. Under the former Staff Rules if the matter was referred to the JDC, the Applicant would invariably be represented by counsel and would be given latitude to cross examine witnesses and to present evidence and submit himself to cross examination. Under the new Staff Rules a referral to the JDC is no longer possible and the whole process boils down to: (i) a preliminary investigation, during which the staff member is compelled to collaborate; (ii) the filing of charges; and (iii) the review of all materials, including the response of the staff member, by the Administration. It is then decided on paper, without the staff member having had an opportunity to question witnesses, whether to impose a disciplinary measure on that staff member. All that the individual is allowed is to comment on the charges in writing.

53. Under both the former and new Staff Rules, the right to counsel would be afforded after the charge or charges have been notified to the staff member that is, when disciplinary proceedings as opposed to investigations are under way. The logic of that system is hard to grasp especially under the new system, which does not allow a hearing as the JDC has been abolished. Counsel's role would be only of an advisory nature as there would not be any adversarial proceedings.

54. Should the investigators have informed the Applicant that he had a right to legal assistance before they questioned him? There is nothing in the Staff Regulations and Rules that imposes such an obligation on the investigators. Equally there is nothing in the rules and regulations that prohibit the investigators from informing a suspected staff member that he/she can be assisted by counsel. And if a staff member requests counsel or asks to consult counsel before answering questions put by the investigators this should not be denied. Such a denial, unless reasonably explained, would amount to a breach of the due process right of a staff member. In the present case, the Tribunal notes the Resondent's submission that the Applicant did not ask for counsel and also notes that the Applicant stated that he could not recall when giving testimony whether he specifically asked for the assistance of counsel. Thus, the Tribunal cannot find that the Applicant's due process rights were breached in this respect.

Use of the Applicant's record of interview as a basis for the disciplinary charges

55. Should confessions or self-incriminating answers obtained in the course of an investigation, where the individual is not warned about the consequences that his/her answers may have, be used against the maker of such statements and would such use be compliant with due process principles? Should such statements be used against an individual in the absence of any other evidence? Admittedly, a disciplinary case is not a criminal case and the high and strict standards that are applicable in a criminal case would not necessarily be applicable in a disciplinary case.

56. On major issues that subsequently formed the basis of the charges the Applicant gave incriminating answers. He conceded that he contracted with United Nations vendors to build a private house. He allowed his brother access to his office to use email facilities. He confessed that emails were sent from his office and that it was a mistake. He helped his wife and brother to run a company and agreed that such action was inappropriate. When asked why he put himself in a position of conflict by contracting with United Nations vendors in a private capacity he stated that he instinctively felt that something was wrong and he understood that the "dual relationship with these vendors was wrong".

57. He was subsequently charged for failing to uphold the highest standards of efficiency, competence and integrity in the discharge of his functions and not conducting himself in a manner befitting an international civil servant. He was also charged with having accepted a gift or favour without the authorisation of the Secretary-General; with being associated with a profit-making business or other concern; with engaging in an outside occupation; with failing to comply with the rules regarding the use of assets of the Organisation and for being in breach of the Financial Rules and Regulations of the Organisation.

58. A glance at the recommendations of the PTF indicates clearly that the PTF recommended that the Administration pursue disciplinary action against the Applicant as a result of the findings in its report. It is significant that reference was constantly being made by OIOS to the answers he had given during that preliminary investigation.

59. What appears to have taken place here is that the Applicant was part of the fact finding process and in the course of that process he made statements that proved incriminating. To what extent may such statements be used to build charges against an individual? This question assumes all its importance in the present case as the investigators referred to the principles of a criminal case in the course of their investigation and emphasised that these principles were relevant to the present case. The concepts of criminal law referred to were: conspiracy; fraud; aiding and abetting and corruption.

60. In *Saunders v. United Kingdom*[18] evidence (not incriminating as such) had been admitted at the applicant's trial. Transcripts of his interviews with inspectors of the Department of Trade and Industry in the United Kingdom were produced at his trial in order to show that he was contradicting himself. At the time of his interrogation by the inspectors he was under a duty under the Companies Act to reply to the inspectors' questions on pain of contempt proceedings. The European Court of Human Rights considered that there was a violation of the right of Mr. Saunders in that the privilege against self-incrimination that he enjoyed was "closely linked" to the presumption of innocence. Saunders was a criminal case. This Tribunal refers to it in view of what the UNAT stated in *Liyanarachige* namely: "In disciplinary matters as in criminal matters, the need to combat misconduct must be reconciled with the interests of the defense."

61. The Tribunal holds that by being compelled to answer the questions put to him by the investigators many of which were highly self-incriminating and to the extent that these answers largely formed the primary basis of the charges against the Applicant, there was a breach of his due process rights in that he was not warned or informed as to consequences of the risk of providing answers to incriminating questions. It is not disputed that the Applicant was under an obligation to answer the questions put to him by the investigators in the course of a lengthy interview amounting to more than a hundred questions. A refusal by the Applicant to answer the questions put to him could have led to the imposition of sanctions on him.

18

Effect of the breach of due process rights, if any, at the stage of the investigation

62. No doubt that the Applicant was denied some of his due process rights at the investigation stage. The question that needs to be addressed is whether these basic flaws notwithstanding the decision of the Respondent, which is based on the findings of the investigators, can still be upheld.

63. The Applicant appealed the decision of the Respondent. He was given a full opportunity and latitude of presenting his case before the Tribunal and of confronting the same witnesses who had given evidence before the investigators. He himself testified and was cross examined. The evidence that transpired during the trial did not materially depart from what the investigators found. In addition to the incriminating answers given by the Applicant there was independent evidence in the form of testimony of witnesses and documents that substantiated the charges against him. Had this not been the case and had the incriminating answers given by the Applicant at the investigation stood alone the Tribunal would not have accepted any decision based on incriminating answers and would have held that there was no evidence to substantiate the charges.

64. Based on the circumstances of this case, the Tribunal finds therefore that the breach of the Applicant's due process rights was cured by the subsequent court proceedings.

Did the acts complained of amount to misconduct?

The burden and standard of proof

65. In *Molari* UNAT held that:

> When termination might be the result, we should require sufficient proof. We hold that, when termination is a possible outcome, misconduct must be established by clear and convincing evidence. Clear and convincing proof requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it means that the truth of the facts asserted is highly probable.

66. In the case of *Masri* 2010-UNAT-098, UNAT held that in disciplinary matters "the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence".

67. This would require a scrutiny of the evidence and this Tribunal endorses the approach it had taken in the case of *Diakite* UNDT/2010/024:

> Once the Tribunal determines that the evidence in support of the charge is credible the next step is to determine whether the evidence is sufficient to lead to the reasonable conclusion that the act of misconduct has been proved. In other words, do the facts presented permit the conclusion that the burden of proof has been met? The exercise involves a careful scrutiny of the facts, the nature of the charges, the defence put forward and the applicable rules and regulations.

68. In the present case the Applicant was informed that some of the charges had been established against him in the following terms: "after a thorough review of the PTF Report, supporting documentation, your comments, and the documentation you have provided, the Secretary-General has concluded that the totality of the evidence indicates that, **on a balance of probabilities, it is more likely than not**, that the charges had been established". *[Emphasis added]*. This was clearly a wrong approach as the standard of proof is higher than a balance of probabilities, a matter that will be addressed below. Notwithstanding a wrong approach adopted by the Secretary-General matters do not end there and that wrong approach cannot automatically work in favour of the individual concerned. The Tribunal still has to exercise its discretion and examine the facts by adopting the correct burden and standard of proof and reach the appropriate conclusion in the light of the evidence and overall proceedings.

69. In *Diakite* the Tribunal adopted the following reasoning:

> The Tribunal has first to determine whether the evidence in support of the charge is credible and capable of being acted upon. Where there is an oral hearing and witnesses have been heard the exercise is easier in the sense that the Tribunal can use the oral testimony to evaluate the documentary evidence. Where there is no hearing or where there is no testimony that can assist the court in relation to the documentary evidence the task may be more arduous. It will be

> up to the Tribunal to carefully scrutinise the evidence in support of the charge and analyse it in the light of the response or defence put forward and conclude whether the evidence is capable of belief or not. In short the Tribunal should not evaluate the evidence as a monolithic structure which must be either accepted or rejected en bloc. The Tribunal should examine each piece of relevant evidence, evaluate its weight and seek to distinguish what may safely be accepted from what is tainted or doubtful.

Charges

70. The Applicant was charged with: (a) being associated with BG Trading and Rila Construction; (b) using ICT resources of the United Nations for private purposes for his private gain and/or the private gain of third parties, namely his wife and/or brother; and (c) knowingly using United Nations ICT resources for a private purpose in relation to his activities in relation to BG Trading PLC and Rila Construction and in relation to his private dealings with Varnero and Elmi.

71. These charges can be considered together since they relate to the use of the official email account of the Applicant in relation to alleged private businesses.

72. The Administration found that the Applicant had engaged in unauthorised outside activities in relation to BG Trading and Rila Construction and that he was actively associated with the management of these companies, while employed as a United Nations staff member. According to the Respondent, this created a perception that the Applicant or these business concerns benefitted by reason of the Applicant's position in the United Nations, inasmuch as there was "sufficient congruence between the activities of these companies" and the responsibilities of the Applicant.

73. In the course of the hearing that took place in Addis Ababa, Ethiopia, the Applicant gave testimony after subscribing to the declaration under art. 17.3 of the Tribunal's Rules of Procedure. He was examined on a number of matters relating to the procurement process and the role, if any, he played in the approval or award of contracts.

74. The Applicant stated that BG Trading was established in August 2001. The main object of the company was to deal with bridal clothing and he had nothing to do with the business of the company except that he was helping his wife to establish it financially. He never received any remuneration from BG Trading. That company never did any business with ECA. Rila Construction was established by his brother and the object of the company was to manufacture concrete tiles. At the time of the hearing the company was still in existence. He never received any remuneration from that company and that company never did business with ECA[19].

75. The Applicant explained that his role was limited to sending and receiving mails on behalf of these companies, a matter which is the subject of a separate charge. The PTF uncovered a number of mails sent from the official email account of the Applicant that relate to the activities of BG Trading[20]. Emails showing an alleged involvement of the Applicant with BG Trading were obtained independently of any assistance of the Applicant[21].

76. The evidence establishes that the Applicant used his official United Nations email account to send and receive mails on behalf of the BG Trading and Rila Construction. |It can be inferred that this was a private use of an official email account. The Applicant stated that he was doing that to help his wife and his brother who at that time had no access to email accounts. But there is no evidence that establishes clearly and convincingly that he obtained any gain of any nature by so doing or that his wife or brother obtained any such gain through his instrumentality. This finding is farfetched and does not rest on any credible factual foundation.

77. Under former staff regulation 1.2(q) staff members were required to use the property and assets of the Organisation only for official purposes and to exercise care when using such property.

[19] Hearing 21 March 2011
[20] See paragraphs 124, 125 and 126 of PTF report
[21] See paragraph 127 of PTF report.

78. The Secretary-General's bulletin on the use of Information and Communication Technology Resources and Data[22] qualifies the former staff regulation 1.2 (q) under the title "Use of property and assets" that allowed staff members to use property and assets of the Organisation for official purposes only and to exercise care when using the property and assets. What exactly was meant by the exercise of care? The immediate conclusion would be that a staff member should not damage the property or assets of the Organisation. But that would be too simple an approach. In the view of this Tribunal the duty of care would also encompass a duty on the part of a staff member not to make an abuse of the use of any assets of the Organisation. There may be different forms of abuse that can only be determined on a case to case basis. In the present case using the United Nations email account on behalf of business companies was certainly not a judicious exercise of care.

79. In the light of the evidence and applying the proper standard of proof and approach to evidence the Tribunal is unable to say that any of these companies had or intended to contract any business with ECA or the United Nations. The object of BG Trading was to deal with bridal clothes and the Tribunal fails to see any congruence between the activities of that company and the official responsibilities of the Applicant in the ECA.

80. In *R v Exall*[23], Pollock CB described circumstantial evidence in the following manner:

> One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.

86. This is exactly the state of the evidence in the case at hand. There is a string of evidence ranging from emails and the testimony of the Applicant from

[22] ST/SGB/2004/15, 29 November 2004
[23] Exall (1866) 4 F&F 922, 929.

which it can be inferred that he was engaged to some extent in the activities of these companies in breach of Former staff regulation 1.2(o).

81. Additionally, the Applicant was charged with having actively engaged with two other United Nations vendors, Geom Luigi Vanero Impreza Costruzioni PLC (Varnero) and Elmi Olindo & Co, PLC (Elmi), in private construction contracts when at the same time these companies were simultaneously bidding for, receiving and performing valuable ECA contracts.

82. The PTF also found evidence that the Applicant had contracted with Varnero and Elmi for the construction of a private building belonging to him and his spouse. At the material time both these companies were United Nations vendors and contractors[24]. At the time of the construction Varnero obtained two ECA contracts of a value of USD 136,565 and the Applicant was the requisitioner for these contracts[25]. One of the contracts was in relation to security barriers to the main entrance of the ECA and was of the value of USD 18,348. That contract was awarded to Varnero without a bidding process after Mr. Peter Marshall, the then Chief of the Security and Safety Service, ECA requested a waiver of the procurement rules. The Applicant agreed to the suggestion of Mr. Marshall[26]. The latter confirmed that the waiver of the procurement rules was his idea[27].

83. The PTF also found evidence that in 2005 Elmi Company did some finishing work for the private residence of the Applicant. At the same time Elmi was awarded four ECA construction contracts of a value of about USD54,000[28].

84. The Applicant did not deny that he contracted with Elmi and Varnero to have a private building constructed when at the same time these two companies were United Nations vendors. He explained that he had nothing to do with the award of any contract to these two vendors and his only participation was to sign memoranda in respect of evaluation and the compliance with technical

[24] See paragraphs 150 to 156 of PTF report
[25] See paragraph 165 of PTF report
[26] See paragraph 166 of PTF report.
[27] See testimony on 22 March 2011.
[28] See paragraphs 169, 170, 171 and 173 to 177 of PTF report.

requirements by the companies that would submit bids to the ECA.[29] Once all administrative procedures had been complied with, he would forward the evaluation to the Chief of General Services who would then forward it to the Chief Procurement Officer. The latter would be the person driving the whole process. But once the contract was awarded to a bidder his office would be involved to monitor the performance of the contractor[30].

85. The Tribunal has perused the lengthy report of the PTF. Admittedly that report went deeply in all the activities of various companies that were contracting with the Organisation and their relationship with the Applicant. It referred to the dealings of the Applicant with some of these companies and emphasised at no time did the Applicant disclose in clear terms as he should have done, given the position he was occupying, any possible conflict of interest.

86. The Tribunal concludes that on the evidence available and notwithstanding the wrong standard of proof adopted by the Respondent in reaching his decision to dismiss the Applicant, when the evidence is assessed according to the proper standard of proof, the acts for which the Applicant was charged amounted to misconduct.

Was the sanction proportionate to the acts of misconduct?

87. The Applicant argued that he neither tried to influence the award of a bid to either of these companies and that he never received any reward from them. Individuals involved in the procurement process, irrespective of their place in the hierarchy, must, like Caesar's wife, be above suspicion. The nature of the activities of procurement demands high standards of those employed in such a capacity.

88. The Applicant was a member of an evaluation committee and his task was to transmit the evaluation reached by the committee to the appropriate officer at the ECA. As such it was incumbent on him to disclose any actual, perceived or potential conflicts of interest. This he did not do and even if he did it was in rather

[29] Hearing 22 March 2011
[30] Hearing 21 March 2011.

vague terms. It was also incumbent on him to strive to avoid perceptions of conflicts of interest, or of undue influence for the sake of the confidence that bidders should have in the procurement process and in the interest of the ethical and financial implications for the Organisation. The duty of an officer who is involved in the procurement process is not only to avoid any actual conflict of interest but perhaps more importantly to avoid a perception of a conflict of interest.

89. Although the Applicant denied he was a requisitioner and insisted that his role was very limited, the Tribunal finds that he occupied an important position in the procurement process at the ECA and as such, he has to be held to the same high standard of integrity as was the applicant in *Streb* 2010-UNAT-080 who accepted "lavish hospitality" from a vendor. UNAT held that though the misconduct was based on a single incident,

> [I]t would have been inappropriate if the Secretary General were to have taken the view that so long as there was no evidence of the applicants' impartiality actually being compromised they would not have committed misconduct or serious misconduct. Any such construction ignores the importance that must properly be attached to ensuring public confidence in the integrity of the UN Procurement Division.[31]

90. The Tribunal finds that the sanction of summary dismissal was fully justified in view of: (i) the status of the Applicant in the procurement process of ECA; (ii) the fact that he contracted with United Nations vendors without disclosing that fact in clear terms; and (iii) the fact that he was engaged to some extent in the activities of BG Trading and Rila Construction without obtaining the appropriate authorisation from the Secretary General.

[31] *Cabrera and Streb* UNDT/2010/034.

(Signed)

Judge Vinod Boolell

Dated this 23rd day of April 2013

Entered in the Register on this 23rd day of April 2013

(Signed)

Abena Kwakye-Berko, Officer-in-Charge, Nairobi Registry